

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

Submitted on Briefs December 9, 2008

GEORGE A. HERBISON
v.
MICHELLE DAWN (FUQUA) HERBISON

Appeal from the Chancery Court for Humphreys County
No. CH-04-085 George C. Sexton, Judge

No. M2008-00658-COA-R3-CV - Filed June 10, 2009

This is a divorce case involving the distribution of marital property. Prior to the parties' marriage, the husband owned and operated a medical supply business, and continued to operate the business after they were married. The business experienced some increase in value during the marriage. After the parties separated, the business' increase in value was very substantial. The husband filed for divorce. Subsequently, he filed a motion for partial summary judgment. The trial court declared the parties divorced and adopted the consent permanent parenting plan, reserving for trial issues relating to child support and the division of the marital estate. After the trial, the trial court found that the wife had not substantially contributed to the increase in value of the husband's business, and that it remained the husband's separate property. The trial court then divided the marital property. The wife appeals, arguing that the increase in value of the husband's business is marital property and that the distribution of the marital estate was inequitable. We affirm, finding that the evidence does not preponderate against the finding that the increase in the value of the company is the husband's separate property and finding no abuse of discretion in the trial court's distribution of the marital estate.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed

HOLLY M. KIRBY, J., delivered the opinion of the Court, in which ALAN E. HIGHERS, P.J., W.S., and J. STEVEN STAFFORD, J., joined.

Charles M. Cary, Bolivar, Tennessee, for the Defendant/Appellant Michelle Dawn (Fuqua) Herbison

David D. Wolfe, Dickson, Tennessee, for the Plaintiff/Appellee George A. Herbison

OPINION

FACTS AND PROCEDURAL HISTORY

George A. Herbison (“Husband”) and Michelle Dawn (Fuqua) Herbison (“Wife”) were married on March 30, 2000. Both had previously been married.

In 1996, prior to the parties’ marriage, Husband started a medical equipment company, Herbison Medical, supplying medical items such as oxygen, wheelchairs, and hospital beds. Husband was the sole owner of the business. Before they married, the parties executed an antenuptial agreement providing that each would retain their separate property.

After the parties married, Husband continued to operate his business. They had two children, the first born in June 2000 and the second in November 2002. Wife stayed at home to raise the parties’ children.

After the parties married, Herbison Medical experienced substantial growth. The reason for the growth of the company’s profits is disputed. The parties separated on March 19, 2004. On March 23, 2004, Husband filed a complaint for divorce. Wife filed an answer and counter-claim seeking divorce on April 8, 2004.

On June 8, 2005, Husband filed a motion for partial summary judgment, asking the trial court to hold that all property owned by him prior to the marriage and all increases in the value of the property be designated as his separate property under the terms of the antenuptial agreement. In response, Wife moved to void the antenuptial agreement on the ground that Husband failed to fully disclose his assets and liabilities. After conducting a hearing, the trial court issued a memorandum opinion on August 15, 2006 denying Husband’s motion for partial summary judgment and granting Wife’s motion to declare the antenuptial agreement invalid. An order reflecting this decision was entered on August 30, 2006.

On March 30, 2007, the trial court entered an order declaring the parties divorced and adopting their proposed permanent parenting plan. The issues of property division and child support were reserved for the trial, held on November 27, 2007.

At trial, the testimony focused on the timing of the very substantial growth of Herbison Medical, the reasons for the company’s growth, and Wife’s contribution to the business. The testimony came primarily from Husband and Wife. At the time of trial, Husband was thirty-nine years old and Wife was thirty-three years old.

Husband testified that he has a high school education and is trained as an emergency medical technician. He started his medical equipment company, Herbison Medical, in 1996. At the time of the parties’ marriage in 2000, Herbison Medical supplied items such as oxygen, wheelchairs, and hospital beds. From 2000 to 2002, Herbison Medical’s net income was \$62,723, \$50,086, and

\$68,124, respectively. In 2003, the company lost \$35,383. In 2004, however, Herbison Medical's net income increased to \$161,963. Husband testified that there were two reasons for the substantial increase in revenues in 2004. In April 2004, after the parties separated, Herbison Medical opened a full-service, compounding pharmacy. In addition, it acquired another medical supply company in Mississippi. Consequently, the company's net income increased to \$890,074 in 2005 and \$1,512,932 in 2006. In 2007, Husband testified, Herbison Medical's revenues declined as the result of new Medicare regulations.

Husband recalled very little involvement by Wife in the business of Herbison Medical, limited primarily to occasionally answering the business telephone. He did not dispute that Wife had primary responsibility at home for raising the parties' children, cooking the family meals, and cleaning the home. After the parties' separation, Husband said, Wife had had nothing to do with Herbison Medical.

Wife had a very different recollection of her involvement with Herbison Medical. Wife testified that she purchased cleaning supplies for the company and cleaned the office on a weekly basis. She said that she would either cook or pick up lunch for the employees at least once a week and that she often prepared breakfast for the employees. Wife claimed that she decorated Herbison Medical's office for Christmas and attended events for doctors' children. Throughout the year, Wife testified, she cooked and hosted parties for Husband's business associates, and cleaned and stocked a camper that Husband used to entertain business associates.

Wife also testified that she often answered the phone on the weekends for Herbison Medical. She said that the responsibility for answering the phone alternated between her and Husband and other employees. During duck hunting season, Wife said, this responsibility fell almost entirely to her. Wife agreed with Husband's testimony that she had had nothing to do with Herbison Medical since the parties' separation in March 2004.

During the parties' marriage, Wife testified, she raised the children, cooked for the family, and cleaned the home. Her testimony on this point was not disputed.

The parties also testified about the extent and value of the marital property. Husband testified that the parties' property on Blue Creek Road is valued at \$210,000, with a debt of approximately \$100,000, and that he owns seventy acres of land in Carroll County, valued at approximately \$80,000. After the parties' separation, Husband bought a home on Ogden Road, in which he was living at the time of trial. The Ogden Road home was purchased for \$550,000 and paid for by a loan to Husband from Herbison Medical in the amount of \$540,000. The amount of the loan to Husband was increased to \$742,675, reflecting other loans that had been taken out by the parties during the marriage. At the time of trial, there was no equity in the Ogden Road house.

With regard to the parties' vehicles, Husband testified that he owns a 2004 Jeep Wrangler, valued at \$19,000, a 2007 Nissan Xterra, valued at \$20,000, and a 1978 Chevy Scottsdale, valued

at \$700. There is no debt on any of the vehicles. Wife testified that she owns a 2006 GMC Envoy, which was valued at \$20,000 by the property list submitted by Husband.

In addition, Husband testified that he owns a CAT trackhoe, valued at \$20,000, and a Mahindra tractor, valued at \$9,000. He said that he also owns Benelli shotguns, valued at \$2,400, and miscellaneous household goods, valued at \$2,000. Husband testified that Wife owns jewelry valued at \$10,000.

After hearing all of the evidence, the trial court issued a memorandum opinion on January 10, 2008. The trial court made no express findings on the credibility of the parties in their differing testimony on the level of Wife's involvement with Herbison Medical, but noted that the majority of the increase in revenue to Herbison Medical occurred after the parties separated. The trial court found that Wife made no substantial contribution to any increase in the value of the company. Therefore, it concluded that the increase in the value of Herbison Medical was Husband's separate property. The trial court divided the marital estate by awarding Wife the Blue Creek Road property, subject to the property's debt. Husband was awarded the property in Carroll County and the Ogden Road property, subject to their debt. Husband was awarded the 2004 Jeep Wrangler, the 2007 Nissan Xterra, and the 1978 Chevy Scottsdale, and Wife was awarded the 2006 GMC Envoy. Husband was also awarded the CAT trackhoe, the Mahindra tractor, as well as the guns and other personal property in his possession. Wife was awarded the jewelry and other personal property in her possession. The trial court issued its final order on March 7, 2008. Wife then filed a timely notice of appeal to this Court.

ISSUES ON APPEAL AND STANDARD OF REVIEW

On appeal, Wife raises two issues for our review. She first argues that the trial court erred in finding that the appreciation in the value of Herbison Medical that occurred during the marriage was Husband's separate property. Second, she contends that the trial court erred in dividing the parties' marital estate. Husband raises the issue of whether the trial court erred in concluding that the antenuptial agreement executed by the parties, providing that any increase in the value of separate property would remain separate property, was void.

Because this case was tried by the trial court sitting without a jury, we review the trial court's findings of fact *de novo* upon the record with a presumption of correctness, unless the evidence preponderates otherwise. Tenn. R. App. P. 13(d); ***Bogan v. Bogan***, 60 S.W.3d 721, 727 (Tenn. 2001) (citations omitted). Some of the trial court's factual findings are based on its determinations of the credibility of the witnesses. This Court affords "great deference" to the trial court's credibility determinations. ***Keaton v. Hancock County Bd. of Educ.***, 119 S.W.3d 218, 223 (Tenn. Ct. App. 2003) (citation omitted). Questions of law, however, are reviewed *de novo* with no presumption of correctness. ***S. Constructors, Inc. v. Loudon County Bd. of Educ.***, 58 S.W.3d 706, 710 (Tenn. 2001) (citations omitted).

ANALYSIS

We first address whether the trial court erred in finding that the appreciation of Herbison Medical that occurred during the marriage was Husband's separate property. Wife argues that her contributions to the company by hosting parties, cooking for employees, cleaning the office, and answering the phone, as well as her care of the parties' children and the home substantially contributed to the increase in value of Herbison Medical, such that the increase in value should be deemed marital property.

In divorce cases, the determination of whether property is separate or marital is considered a threshold issue because courts are only permitted to equitably divide marital property. *Cutsinger v. Cutsinger*, 917 S.W.2d 238, 241 (Tenn. Ct. App. 1995). A divorcing spouse who seeks to include in the marital estate property that the other spouse claims is separate property has the burden of proving that the disputed property satisfies the definition of marital property. *Keyt v. Keyt*, 244 S.W.3d 321, 328 (Tenn. 2007) (citing *Kinard v. Kinard*, 986 S.W.2d 220, 232 (Tenn. Ct. App. 1998)).

The terms "separate property" and "marital property" are both defined by statute. The definition of separate property includes "[a]ll real and personal property owned by a spouse before marriage" as well as "[i]ncome from and appreciation of property owned by a spouse before marriage except when characterized as marital property under subdivision (b)(1)." T.C.A. § 36-4-121(b)(2)(A), (C) (2005). The definition of marital property in subdivision (b)(1) "includes income from, and any increase in value during the marriage of, property determined to be separate property in accordance with subdivision (b)(2) if each party substantially contributed to its preservation and appreciation." T.C.A. § 36-4-121(b)(1)(B) (2005).

Therefore, any increase in the value of a spouse's separate property during the marriage remains that spouse's separate property, unless both parties "substantially contributed" to its preservation and appreciation. *See* T.C.A. § 36-4-121(b)(1)(B), (2)(C) (2005); *Keyt*, 244 S.W.3d at 328–29 (citing *Harrison v. Harrison*, 912 S.W.2d 124, 127 (Tenn. 1995)). While the spouse's contributions may be either "direct" or "indirect," T.C.A. § 36-4-121(b)(1)(D) (2005), they must satisfy two requirements. *Keyt*, 244 S.W.3d at 329 (citing *McFarland v. McFarland*, No. M2005-01260-COA-R3-CV, 2007 WL 2254576, at *6 (Tenn. Ct. App. Aug. 6, 2007)). "First, the contributions must be 'real and significant.'" *Id.* (citing *McFarland*, 2007 WL 2254576, at *6; *Brown v. Brown*, 913 S.W.2d 163, 167 (Tenn. Ct. App. 1994)). "Second, there must be some link between the spouses' contributions and the appreciation in the value of the separate property." *Id.* (quoting *McFarland*, 2007 WL 2254576, at *6). The trial court's determination of whether the spouse made a substantial contribution to the preservation and appreciation of the other spouse's separate property is a question of fact. *Sherrill v. Sherrill*, 831 S.W.2d 293, 295 (Tenn. Ct. App. 1992) (citation omitted).

In this case, Wife concedes that she had no direct role in the management of Herbison Medical. She insists, however, that she was directly involved in some aspects of the company, such

as answering the phone on the weekend, cleaning the office, and cooking for and hosting parties for the employees and other business associates. She argues that these activities show that she substantially contributed to the preservation and appreciation of Herbison Medical.

Husband disputed Wife's testimony on the level of Wife's involvement in Herbison Medical, and the trial court made no explicit determination on the credibility of the parties on this issue. The trial court noted only that the majority of the increase in the value of the business occurred after the parties separated.

We must conclude that, even if Wife's testimony is credited, her activities are insufficient to support a finding that the increase in value is marital property. In *Keyt*, cited above, the Tennessee Supreme Court found that a husband's contributions to the family-owned trucking company did not constitute a substantial contribution to the increased stock price of the company, even though he had worked for the company for over twenty years, traveled on company business on a weekly basis, helped open trucking terminals by driving and picking up freight, and did "whatever needed to be done." *Keyt*, 244 S.W.3d at 330–32. The Court noted that the tasks done by the husband were consistent with those done by low-level or mid-level employees and that he was not responsible for "directing the company or contributing to its growth." *Id.* at 332.

Like the husband in *Keyt*, Wife performed tasks that are usually done by low-level employees, and she admits that she was not involved in the management of the company. Most importantly, the trial court found that the majority of the increase in value of Herbison Medical occurred after the parties' separation, indicating that Wife's alleged direct contributions did not substantially contribute to the appreciation in value because Wife ceased contributing when the parties separated. Therefore, we cannot conclude that the evidence preponderates against the trial court's finding that any direct contributions by Wife did not substantially contribute to the increase in value of Herbison Medical.

A more troubling issue is whether Wife's indirect contributions as homemaker substantially contributed to Herbison Medical's increase in value. The applicable statute specifically provides that "substantial contribution" may include the "indirect contribution of a spouse as homemaker, wage earner, parent or family financial manager, together with such other factors as the court having jurisdiction thereof may determine." T.C.A. § 36-4-121(b)(1)(D) (2005); *see also Brown*, 913 S.W.2d at 167–68. The Middle Section of this Court has said that

when a spouse is asserting that his or her indirect contributions resulted in the appreciation of the other spouse's property, the pivotal inquiry is whether there was an appreciation in the value of the separate property due to the efforts of the spouse who owned it which were aided or facilitated in some way by the indirect contributions of the other spouse.

McFarland, 2007 WL 2254576, at *7 (citing *Price v. Price*, 503 N.E.2d 684, 690 (N.Y. 1986)).

In this case, it is undisputed that Wife cared for the children and the home, thereby enabling Husband to focus his efforts on Herbison Medical. Moreover, despite the fact that the majority of the increase occurred after the parties' separation, Wife's role as the primary caretaker for the parties' children did not end when the parties separated. In some instances, such indirect activities may serve as the basis for a finding of a substantial contribution, providing there is a link between the non-owning spouse's contributions and the increase in value. *See Keyt*, 244 S.W.3d at 329 n.10; *Brown*, 913 S.W.2d at 167–68. In this case, however, Husband attributed the increase in the company's revenues to the acquisition of a compounding pharmacy and an additional medical supply company in Mississippi. We must conclude that the trial court implicitly credited Husband's testimony, since it found that Wife's activities did not substantially contribute to the increase in value of Herbison Medical. The trial court's findings on credibility, whether express or implicit, are entitled to great deference on appeal. *See Taylor v. McKinnie*, No. W2007-01468-COA-R3-JV, 2008 WL 2971767, at *4 (Tenn. Ct. App. Aug. 5, 2008). Based on the record before us, we cannot conclude that the evidence preponderates against the trial court's findings that Wife did not substantially contribute to the increase in value of Herbison Medical and that the increase in value of Herbison Medical is Husband's separate property.¹

Wife also argues that the trial court erred in its distribution of the marital estate, contending that the distribution is inequitable because she has neither a high school education nor the "vocational skills, employability or earning capacity of [Husband]." She insists that when the trial court divided the marital estate, it failed to consider the value of Herbison Medical as Husband's separate property, and also failed to consider that she would be responsible for the mortgage on the Blue Creek Road property. Wife also maintains that the loan from Herbison Medical to Husband in the amount of \$742,675 is not really a loan at all; rather, it is an asset because, as the sole stockholder in Herbison Medical, Husband owes the money to himself.

The division of marital property in divorce cases is governed by Tennessee Code Annotated § 36-4-121, which generally provides that the trial court is to divide the property equitably without regard to fault.² The trial court has substantial discretion when dividing the marital property, and its distribution will be given "great weight" on appeal. *See Ford v. Ford*, 952 S.W.2d 824, 825 (Tenn. Ct. App. 1996). Accordingly, appellate courts "are disinclined to disturb the trial court's decision unless the distribution lacks proper evidentiary support or results from some error of law or misapplication of statutory requirements and procedures." *Martin v. Martin*, 155 S.W.3d 126,

¹This holding pretermits the issue raised by Husband in this appeal, namely, the issue of the validity of the antenuptial agreement.

² Tennessee Code Annotated § 36-4-121(a)(1) provides as follows:

In all actions for divorce or legal separation, the court having jurisdiction thereof may, upon request of either party, and prior to any determination as to whether it is appropriate to order the support and maintenance of one (1) party by the other, equitably divide, distribute or assign the marital property between the parties without regard to marital fault in proportions as the court deems just.

T.C.A. § 36-4-121(a)(1) (2005).

129 (Tenn. Ct. App. 2004) (quoting *Herrera v. Herrera*, 944 S.W.2d 379, 389 (Tenn. Ct. App. 1996)).

When making an equitable division of the marital estate, the trial court shall consider “all relevant factors,” including the following:

- (1) The duration of the marriage;
- (2) The age, physical and mental health, vocational skills, employability, earning capacity, estate, financial liabilities and financial needs of each of the parties;
- (3) The tangible or intangible contribution by one (1) party to the education, training or increased earning power of the other party;
- (4) The relative ability of each party for future acquisitions of capital assets and income;
- (5) The contribution of each party to the acquisition, preservation, appreciation, depreciation or dissipation of the marital or separate property, including the contribution of a party to the marriage as homemaker, wage earner or parent, with the contribution of a party as homemaker or wage earner to be given the same weight if each party has fulfilled its role;
- (6) The value of the separate property of each party;
- (7) The estate of each party at the time of the marriage;
- (8) The economic circumstances of each party at the time the division of property is to become effective;
- (9) The tax consequences to each party, costs associated with the reasonably foreseeable sale of the asset, and other reasonably foreseeable expenses associated with the asset;
- (10) The amount of social security benefits available to each spouse; and
- (11) Such other factors as are necessary to consider the equities between the parties.

T.C.A. § 36-4-121(c) (2005). The division of the marital estate does not have to be equal in order to be equitable. *See Kinard*, 986 S.W.2d at 230 (citations omitted).

The factors listed by Wife are clearly proper for the trial court to consider in dividing the marital estate. However, there is no indication in the record that the trial court failed to consider those factors when it made its distribution. Based on the values in the record, the value of Wife’s share of the marital estate amounted to approximately \$140,000 and the value of Husband’s was approximately negative \$39,000. Wife’s argument on the inequality of the distribution is based primarily on her contention that the loan from Herbison Medical to Husband is really an asset and not a loan. We recognize that Husband is the sole stockholder in Herbison Medical, Inc., and this can sometimes lead to a blurring of the lines between the corporation and its owner. The trial court was clearly aware of this issue and in fact found that a recent audit by the IRS “has caused [Husband] to take the necessary safeguards to keep [his] personal and corporate incomes separate.” Under all of these circumstances, we cannot say that the trial court abused its discretion in its distribution of the marital estate.

CONCLUSION

The decision of the trial court is affirmed. The costs of this appeal are taxed to the appellant Michelle Dawn (Fuqua) Herbison, and her surety, for which execution may issue if necessary.

HOLLY M. KIRBY, JUDGE